STATE OF MINNESOTA
IN COURT OF APPEALS
A09-486

State of Minnesota,
Respondent,

vs.

Alejandro Hernandez,
Appellant.

Filed June 8, 2010
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CR-08-23332

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Hudson, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

A Hennepin County jury found Alejandro Hernandez guilty of aiding and abetting first-degree assault, second-degree assault, and second-degree riot based on evidence that he committed an assault with a dangerous weapon that inflicted great bodily harm. On appeal, he argues that he should be given a new trial because the prosecutor committed misconduct in examining a witness and in closing argument and because the district court erred in refusing to instruct the jury on the issue of self-defense. We affirm.

FACTS

On August 26, 2007, Hernandez attended a back-yard party at a duplex apartment in Minneapolis. The party was somewhat loud. The downstairs resident of the duplex, N.H.S., asked his upstairs neighbor, who was hosting the party, to reduce the volume of the music and noise emanating from the party. N.H.S. then was assaulted by approximately eight to ten guests of the party. The state's witnesses testified that N.H.S. was knocked to the ground, kicked, struck by belts with large buckles, clubbed on the head with two-by-four boards, and hit in the face with rocks. His injuries included multiple fractures of his skull and facial bones. He was hospitalized for five days in an intensive care unit, and he later underwent reconstructive surgery on his face.

At trial, the state and the defense presented dramatically different versions of how N.H.S. was injured and Hernandez's role in the melee. The state presented evidence that, after an initial altercation in the back yard, N.H.S. tried to retreat inside the apartment, but some of the attackers, including Hernandez, followed him to the front of the duplex.

According to the state's witnesses, a second assault occurred at the entrance to N.H.S.'s apartment when Hernandez struck N.H.S. with a two-by-four board. Both N.H.S.'s girlfriend and his girlfriend's niece witnessed the attack and testified at trial.

According to the defense witnesses, N.H.S. was the aggressor in the incident. Hernandez testified that N.H.S. shoved Hernandez's father to the ground and ripped off his shirt. H.C. testified that N.H.S. hit him in the head with a belt and that Hernandez merely pushed N.H.S. to the ground. Hernandez testified that he shoved N.H.S. to the other side of the yard to separate him from the other people. H.C. also testified that, though he was present during the attack, he never saw Hernandez possess a two-by-four. Hernandez testified that N.H.S. was not bleeding when he left the backyard and that he did not follow N.H.S. to the front of the duplex. Hernandez also stated that he did not strike anyone with a two-by-four and did not observe anyone else hit N.H.S. with a two-by-four.

The state charged Hernandez with one count of aiding and abetting second-degree assault (using a dangerous weapon and inflicting substantial bodily harm), in violation of Minn. Stat. §§ 609.222, subd. 2, .05 (2006); one count of aiding and abetting first-degree assault (inflicting great bodily harm), in violation of Minn. Stat. §§ 609.221, subd. 1, .05 (2006); and one count of aiding and abetting second-degree riot, in violation of Minn. Stat. §§ 609.71, subd. 2, .05 (2006). After a five-day trial, the jury found Hernandez guilty on all counts. The district court imposed a sentence of 74 months of imprisonment. Hernandez appeals.

D E C I S I O N

I. Prosecutorial Misconduct

Hernandez first argues that the prosecutor engaged in prosecutorial misconduct in two ways: first, by stating that Hernandez and another defense witness "tailored" their testimony and, second, by impermissibly interjecting her personal opinion into the case.

"Due process guarantees in our state and federal constitutions include the right to a fair trial." *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005). A defendant's right to a fair trial may be violated by the existence of prosecutorial misconduct. *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). The standard of review that we apply depends on whether a proper objection was made. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). "For unobjected-to prosecutorial misconduct, we apply a modified plain error test. For objected-to prosecutorial misconduct, we have utilized a harmless error test, the application of which varies based on the severity of the misconduct." *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007) (citation omitted).

At trial, Hernandez did not object to the prosecutor's comments on the grounds that he now urges on appeal, with one exception. Thus, except as noted below, we apply a "modified plain error test." *Id.*; *see also State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under the modified plain-error test, "the defendant must establish both that misconduct constitutes error and that the error was plain." *Wren*, 738 N.W.2d at 393. An error is "plain" if it "'contravenes case law, a rule, or a standard of conduct.'" *Id.* (quoting *Ramey*, 721 N.W.2d at 302). If an appellant can establish that a plain error

occurred, "[t]he burden then shifts to the state to demonstrate that the error did not affect the defendant's substantial rights." *Id*. "If the state fails to demonstrate that substantial rights were not affected, 'the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.'" *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (quoting *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)).

A. Accusation of "Tailoring"

Hernandez contends that the prosecutor committed misconduct by accusing him -- once during cross-examination and once in her closing argument -- of tailoring his testimony to the state's evidence.

A prosecutor's accusation of "tailoring" typically consists of a statement, more or less explicit, that a testifying defendant was present throughout the trial and therefore had an opportunity to fashion his or her testimony in a way that is both inculpatory and in conformance with the state's evidence. *See, e.g.*, *State v. Leutschaft*, 759 N.W.2d 414, 419 (Minn. App. 2009) (stating that "'tailoring' occurs when a witness shapes his testimony to fit the testimony of another witness or to the opponent's version of the case"). Such an accusation implicates a defendant's constitutional right to be present at trial, which is derived from the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. *State v. Swanson*, 707 N.W.2d 645, 657 (Minn. 2006). As a general rule, a prosecutor may not accuse a defendant of tailoring his or her testimony solely because the defendant was present at trial "because a defendant's mere presence in the courtroom says nothing probative about his or her

guilt." *State v. Van Keuren*, 759 N.W.2d 36, 42 (Minn. 2008). Therefore, "the prosecution cannot use a defendant's exercise of his right of confrontation to impeach the credibility of his testimony, at least in the absence of evidence that the defendant has tailored his testimony to fit the state's case." *Swanson*, 707 N.W.2d at 657-58.

In this case, Hernandez contends that the prosecutor made an improper accusation of tailoring on two occasions. The first occasion was a portion of her cross-examination of Hernandez:

> Q. Well, you heard the testimony of your childhood friend, [H.C.], this morning stating that when [N.H.S.] first got out of his vehicle and saw all of you standing there, that he immediately removed his shirt and got into some kind of a fighting stance. Do you remember that testimony?
>
> A. Of course I did.
>
> Q. Now, would you also agree that during the trial you have had the opportunity to hear everyone's testimony?
>
> A. Yes.
>
> Q. Unlike all the other witnesses who were sequestered from hearing anyone else's testimony?
>
> A. Uh-huh.
>
> Q. So you've had plenty of time to think about that testimony and tailor your testimony to fit to benefit yourself, isn't that true?
>
> A. I haven't been planning -- I'm just telling what happened, that's all.

The second occasion was during closing argument, when the prosecutor referred to the previously quoted portion of her cross-examination of Hernandez:

> The facts in this case are bad for the defendant. He has every reason to fabricate his testimony. He sat through the entire trial. He heard the testimony and saw all of the physical evidence, even the photos of the bloody weapons. He sat there with counsel reviewing while I waited right back here. He couldn't even admit to that. He had plenty of time to tailor his testimony to his own benefit, not to tell you the truth.

Hernandez contends that these accusations of tailoring are improper because there is no evidence of "actual tailoring" in the record. In its responsive brief, the state does not directly address the statements quoted above but, rather, focuses on other statements or on portions of the statements Hernandez has identified.

This case presents a relatively straightforward example of an improper accusation of tailoring. The prosecutor explicitly stated that Hernandez "tailored" his testimony. In most cases, an accusation or suggestion of tailoring is more subtle. *See, e.g.*, *Leutschaft*, 759 N.W.2d at 419 (noting that "implication" of prosecutor's question is "obvious"). Here, however, the prosecutor actually used the word "tailor" in both her cross-examination of Hernandez and in her closing argument. An accusation of tailoring may be justified if there is evidence in the record to support it. *See State v. Dobbins*, 725 N.W.2d 492, 507-08 (Minn. 2006). But the state has not sought to justify the prosecutor's statements on that basis. Thus, the prosecutor committed an error that is plain by accusing Hernandez of tailoring his testimony to the state's evidence. *See State v. Mayhorn*, 720 N.W.2d 776, 790-91 (Minn. 2006) (holding that prosecutor improperly

commented on defendant's opportunity to tailor testimony though there was no evidence of actual tailoring).[1]

At the next step of the modified plain-error test, the burden "shifts to the state to demonstrate that the error did not affect the defendant's substantial rights." *Wren*, 738 N.W.2d at 393; *see also Ramey*, 721 N.W.2d at 302. "Prosecutorial misconduct affects substantial rights if there is a reasonable likelihood that the absence of misconduct would have had a significant effect on the jury's verdict." *Davis*, 735 N.W.2d at 681-82.

> In assessing whether there is a reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury's verdict, we consider [1] the strength of the evidence against the defendant, [2] the pervasiveness of the improper suggestions, and [3] whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions.

Id. at 682.

In this situation, the three *Davis* factors lead to the conclusion that the prosecutor's accusations of tailoring did not affect Hernandez's substantial rights. First, the state's

[1]Hernandez also contends that the prosecutor engaged in misconduct by accusing a defense witness, H.C., of "tailoring" his testimony by arranging with Hernandez, before trial, to falsify testimony in consistent ways. This argument fails as a matter of law because it is an attack on H.C.'s credibility, not Hernandez's. H.C. does not have a constitutional right to be present at trial. The caselaw on which Hernandez relies "is limited to cases in which the state's argument infringes on the defendant's Confrontation Clause rights," *Van Keuren*, 759 N.W.2d at 42, which means that it does not apply to a person other than the defendant. A prosecutor has the right during closing argument "to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom." *State v. Wahlberg*, 296 N.W.2d 408, 419 (Minn. 1980). More specifically, a prosecutor "may point to circumstances which cast doubt on a witness' veracity or which corroborates his or her testimony." *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). The prosecutor did not violate these principles by accusing H.C. of fabricating testimony to favor Hernandez's defense.

witnesses who observed the attack testified without equivocation that Hernandez knocked N.H.S. to the ground, kicked him, and hit him on the head with a two-by-four board. N.H.S. testified that Hernandez hit him in the forehead with a two-by-four when he was surrounded by party guests and again when he was going up the stairs to his apartment. N.H.S.'s girlfriend, T.M., testified that she saw Hernandez run up the front steps and strike N.H.S. on the head with a two-by-four. T.M.'s niece testified that she was standing near the front porch when she saw Hernandez hit N.H.S. on the head with a two-by-four. In addition, a forensic specialist who was dispatched to the scene testified that "there was a two-by-four piece of wood on the north side of the dwelling" near the backyard area.

Second, the prosecutor's improper comments were not pervasive; they consist of fewer than five pages of transcript. *See State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003) (considering relative length of objectionable passage in analyzing improper comment). Third, Hernandez expressly denied during his cross-examination that he was tailoring his testimony to the state's evidence and insisted that he simply was telling the jury what he did and saw. Thus, the state has demonstrated that the prosecutor's erroneous accusation of tailoring did not affect Hernandez's substantial rights and, therefore, is not a basis for granting Hernandez a new trial.

B. Expression of Personal Opinion

Hernandez next contends that the prosecutor committed misconduct by improperly injecting her personal opinion into the case during her cross-examination of H.C.

During closing argument, "[p]rosecutors must not interject their personal opinions into a case. This is so in order to prevent 'exploitation of the influence of the

prosecutor's office.'" *State v. Blanche*, 696 N.W.2d 351, 375 (Minn. 2005) (quoting *State v. Everett*, 472 N.W.2d 864, 870 (Minn. 1991)). The same principles apply during a prosecutor's cross-examination of a witness. *Mayhorn*, 720 N.W.2d at 786. We examine allegations of prosecutorial misconduct in light of the record as a whole. *Powers*, 654 N.W.2d at 678; *State v. McDaniel*, 534 N.W.2d 290, 293 (Minn. App. 1995), *review denied* (Minn. Sept. 20, 1995). Only when the alleged misconduct, "viewed in light of the entire record, is of such serious and prejudicial nature that appellant's constitutional right to a fair trial was impaired" is reversal warranted. *State v. Haynes*, 725 N.W.2d 524, 529 (Minn. 2007) (quotation omitted).

In this case, Hernandez contends that the prosecutor made two comments during her cross-examination of H.C. in which she improperly expressed her personal opinion. The first comment was as follows:

> Q. Where do you think all this blood came from?
>
> A. I don't know.
>
> Q. *Well, let me tell you. It all came from [N.H.S.] after you all attacked him and beat him with sticks and rocks and kicked him while he was down on the ground, that is where those injuries -- or that blood came from.*
>
> . . . .
>
> Q. Then there is another photograph, and this is the exterior of the house showing blood splatters all over the front wall of the house. How do you imagine those blood splatters got there?
>
> A. I don't know. Maybe it was his.
>
> Q. I will tell you. . . .

> There has been testimony heard during the trial that *these blood splatters were a result of the defendant coming up to [N.H.S.] while he was bleeding profusely, and while he was unresponsive on the porch, taking this and hitting him on top of his bloody head causing those splatters.*
>
> THE COURT: Is there a question?

(Emphasis added.) The second comment is as follows:

> Q. So your whole group felt the need to stay around and beat [N.H.S.] in the face, kicking, using rocks, using sticks, using your feet and your fists, you felt the need to stay and inflict that kind of pain and injury on that man simply because he allegedly struck you in the head with a belt?
>
> A. I don't think that was anyone's intention. Things -- I don't know if they turned out that way because there were problems between people or what. I don't think it was any of our intention to -- I mean, he comes from the same town in Mexico that we are all from. I don't think we have any reason to treat him like that.
>
> *Q. Well, it does baffle me that you all grew up or came from the same town, [H.C.], but to outnumber a man nine to one and then proceed to beat him mercilessly like that, to the point where at times he was begging you to stop, I -- I just can't wrap my head around that.*

(Emphasis added.) Hernandez objected after this exchange, and the district court sustained the objection. Thus, we apply the harmless-error rule to the second allegedly improper comment. *Wren*, 738 N.W.2d at 393-94.

Hernandez contends that these two statements constitute misconduct because they are improper expressions of the prosecutor's personal beliefs or opinions. In response, the state contends that the first statement is not the prosecutor's personal opinion because

the prosecutor was merely summarizing the testimony of prior witnesses. The state also contends that any error arising from the second statement should not result in reversal of the convictions because the error was cured when the district court sustained the objection. Hernandez is correct that an argumentative question may constitute prosecutorial misconduct because it is a means of inserting the prosecutor's personal opinion into the case. *Mayhorn*, 720 N.W.2d at 786. We believe that the prosecutor engaged in prosecutorial misconduct by making the improper comments that are highlighted above. The comments are not even phrased as questions, even though they occurred in the course of cross-examination. In the first comment, the prosecutor provided an answer to her own question. The prosecutor also recited some of the state's evidence in a colorful manner without any attempt to elicit testimony from the witness. And in the second comment, the prosecutor explicitly stated her view of the evidence, namely, that she could not understand the conduct of Hernandez and others. These comments were calculated to "exploit[] . . . the influence of the prosecutor's office." *Blanche*, 696 N.W.2d at 375 (quotation omitted). Thus, we conclude that the prosecutor's statements were improper expressions of personal opinion that constitute prosecutorial misconduct.

As stated above, at the third step of the modified plain-error test, which applies to the first comment, the burden "shifts to the state to demonstrate that the error did not affect the defendant's substantial rights." *Wren*, 738 N.W.2d at 393; *see also Ramey*, 721 N.W.2d at 302. "Prosecutorial misconduct affects substantial rights if there is a reasonable likelihood that the absence of misconduct would have had a significant effect

on the jury's verdict." *Davis*, 735 N.W.2d at 681-82. Similarly, under the harmless-error test, which applies to the second comment, the state presumably has the burden of persuasion on the question whether the misconduct affected the defendant's substantial rights. *See State v. Reed*, 737 N.W.2d 572, 583-84 (Minn. 2007); *State v. Shoen*, 598 N.W.2d 370, 377-78 & n.2 (Minn. 1999).

A review of the record leads to the conclusion that the prosecutor's improper expressions of personal opinion did not affect Hernandez's substantial rights. As discussed above in part I.A., several of the state's witnesses testified that they observed Hernandez attack N.H.S. and strike N.H.S. in the head with a two-by-four. Also, the prosecutor's improper comments were not pervasive; they consist of approximately one page of the transcript. *See Powers*, 654 N.W.2d at 679. A jury's verdict is not likely attributable to an incident of prosecutorial misconduct if the alleged misconduct was isolated and confined to only one question. *Haynes*, 725 N.W.2d at 530. In addition, the district court sustained Hernandez's objection to the second comment, and a jury is presumed "to have disregarded any question to which an objection was sustained." *State v. Steward*, 645 N.W.2d 115, 122 (Minn. 2002); *see also State v. Davis*, 685 N.W.2d 442, 446 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004). Furthermore, the district court instructed the jury that "neither the arguments nor other remarks of a lawyer are evidence in the case" and that it can only "consider the evidence that has been properly admitted in the case" during its deliberations. *See Ture*, 353 N.W.2d at 517 (recognizing that prosecutor's personal opinion may be harmless if district judge cautioned jury to consider evidence and that argument is not evidence); *State v. Yang*, 627 N.W.2d 666,

681 (Minn. App. 2001) (recognizing that improper comments are harmless if district court instructs jury that closing argument is argument and that jury should rely on its own recollection of facts), *review denied* (Minn. July 24, 2001).

Thus, the state has demonstrated that the erroneous injection of the prosecutor's personal opinion did not affect Hernandez's substantial rights and, therefore, is not a basis for granting Hernandez a new trial.

II. Self-Defense Jury Instruction

Hernandez also argues that the district court erred by denying his request for a jury instruction on self-defense and defense of others.

A defendant is entitled to an instruction on his or her theory of the case "if there is evidence to support it," *State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977), and if the requested instruction "is warranted by the facts and the relevant law," *State v. McCuiston*, 514 N.W.2d 802, 804 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). "In evaluating whether a rational basis exists in the evidence for a jury instruction, the evidence is viewed in the light most favorable to the party requesting the instruction." *State v. Edwards*, 717 N.W.2d 405, 410 (Minn. 2006). We apply an abuse-of-discretion standard of review to a district court's refusal to give a requested jury instruction. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996).

A defendant seeking acquittal on the basis of self-defense "has the burden of going forward with evidence to support his claim of self-defense." *State v. Columbus*, 258 N.W.2d 122, 123 (Minn. 1977). If the defendant does not produce such evidence, "there

is no right to the self-defense instruction." *State v. Graham*, 371 N.W.2d 204, 209 (Minn. 1985). To support a claim of self-defense, a defendant must show:

> (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he or she was in imminent danger of death or great bodily harm; (3) the existence of reasonable grounds for that belief; and (4) the absence of a reasonable possibility of retreat to avoid the danger.

State v. Basting, 572 N.W.2d 281, 285 (Minn. 1997). If a defendant has satisfied this burden, "the state must demonstrate that the defendant did not act in self-defense by negating one of the four elements of the defense." *State v. Soukup*, 656 N.W.2d 424, 429 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003).

In denying Hernandez's request for a jury instruction on self-defense, the district court stated:

> I don't think self defense is an appropriate instruction for the jury in this case because . . . Mr. Hernandez testified he was never threatened at any time and doesn't admit to doing anything other than, as I recall, grabbing on to [N.H.S.] and pushing him maybe. Other than that, he doesn't admit to striking him or hitting him with anything, so I think it is just confusing to the jury. His defense seems to be, more than anything, that he didn't do it.

The district court's analysis of the evidentiary record is correct. Hernandez was charged with first-degree and second-degree assault, which requires proof that he used a dangerous weapon and inflicted substantial or great bodily harm. *See* Minn. Stat. §§ 609.221, subd. 1, .222, subd. 2. At trial, however, Hernandez testified only that he lunged at N.H.S. and shoved him to the other side of the yard. Hernandez's testimony does not constitute an admission that he committed first- or second-degree assault. In

fact, Hernandez's appellate brief states that he "denied hitting [N.H.S.] with the board." Thus, as the district court observed, Hernandez did not satisfy his burden of producing evidence that he committed the alleged offenses in self-defense. A district court does not err by denying a self-defense instruction if the defendant's own testimony is inconsistent with a self-defense theory. *State v. Jensen*, 448 N.W.2d 74, 76 (Minn. App. 1989); *State v. Johnson*, 392 N.W.2d 357, 358 (Minn. App. 1986); *State v. Pacholl*, 361 N.W.2d 463, 465 (Minn. App. 1985).

Thus, the district court did not abuse its discretion by denying Hernandez's request for an instruction on the defense of self-defense.

Affirmed.